plaintiff engages himself in. For instance, as a winch driver his disability would be 100%. The doctor wound up his evidence by saying that plaintiff's hand is not entirely useless. It is still fairly useful to him and by exercise and training the plaintiff could make his hand a little more useful, although he hastened to add that there will be very slight improvement in plaintiff's hand with exercise and training.

The plaintiff is 32 years of age. Apart from the deformity of his hand, he would appear to be a normal healthy person with a reasonable expectation of a normal healthy life, barring accidents, of at least another twenty years. His wages as a winch driver were $5.20 a day. He stated in his evidence that he earned an additional six to seven dollars per day for overtime. In cross-examination, however, he admitted that his average daily earnings for overtime would be $3.00 to $3.50. He also claimed that he earned about $60 a month by sewing clothes for other people during his spare time. In this connection he produced a witness who stated that on one occasion he got the plaintiff to make two shirts for him for which he paid him $5.00 I do not believe that the plaintiff earned very much as a spare time tailor, if he earned anything at all. In my opinion, his total monthly wages including extra wages for overtime could not have exceeded $220.

In assessing damages for the plaintiff, I had in mind the decisions of the Court of Appeal in the cases of *Pahang Lin Siong Motor Co. Ltd. & Anor.* v. *Cheong Swee Khai & Anor.* [1] and *Jag Singh* v. *Toong Fong Omnibus & Co. Ltd.*[2] to which I was referred by learned counsel for the plaintiff. I also had in mind the decision of Ismail Khan J. in the case of *Low Kwee Swee* v. *Chu Teck Tong & Anor.* [3], a digest of which appears at page lxxxiii in the July 1962 issue of the *Malayan Law Journal*. I also took into consideration the plaintiff's age, the ordinary hazards of life, the pain and suffering which the plaintiff suffered as a result of the injuries, the impairment and consequently the potential future earning capacity of the plaintiff and the loss of amenities. Taking all these factors into consideration, I considered a sum of $12,500 as a reasonable sum for general damages, from which was deducted a sum of $280 which the plaintiff had admittedly received by way of advances from the defendants. I awarded a sum of $496.50 for special damages and thus gave judgment to the plaintiff for $12,716.50 with interest thereon at 6% per annum from the date of judgment to the date of satisfaction and taxed costs.

Order accordingly.

Solicitors: *Kaher Singh & Karam; Shearn Delamore & Co.*

SYNN LEE & CO. LTD. v. BANK OF CHINA

[C. A. (Thomson C.J., Hill and Good JJ.A.) September 25, 1962]

[Penang — F.M. Civil Appeal No. 8 of 1962]

Banking law — Cheques — Claim as holder in due course — Arrangement to draw against cheques before clearance — Whether arrangement existed.

Appeal — Findings of fact — Judgment based on.

Evidence Ordinance, 1950, s.114, ill. (g) — Non-production of documents — Presumption — Discretion of Court.

The facts of the case and the issues involved are fully stated in the judgment of Hepworth J. ([1962] M.L.J. 91).

This was an appeal from the judgment of Hepworth J., *ante* p. 91. The only question really in issue on appeal was whether or not there were arrangements between the plaintiffs and the firm Heng Moh & Co., in whose favour the cheques in question in this case were drawn by the appellants, in consequence of which the bank became holders for value of the cheques.

Before the Court of Appeal it was argued that the vouchers which related to the cheques and which were not produced at the trial were in the possession of the bank and that therefore the presumption as laid down in section 114, illustration (g) of the Evidence Ordinance should operate.

At the trial there had been no mention of these documents until at a late stage. The respondents' counsel then asked for an adjournment to produce them. Counsel for the appellants objected as a result of which the application was refused.

Held in dismissing the Appeal: this was not a proper case for the operation of the presumption in section 114, illustration (g) as the appellant had not as a matter of ordinary prudence taken steps to obtain discovery of these vouchers whether or not they were enumerated in the schedules to the bank's affidavits. Further as the respondents' counsel was prepared to produce these vouchers at the trial if the necessary adjournment was given, but as this was opposed by the appellants they should have no cause for complaint and they are not entitled at the trial to rely in any way on the non-production of the vouchers.

Cases referred to:—

(1) *Bilas Kunwar* v. *Desraj Ranjit Singh*, 42 I.A. 202, 206; A.I.R. 1915 P.C. 96; I.L.R. 37 All 557.

(2) *T.S. Murugesam Pillai* v. *M.D. Gnana Sambandha Pandara Sannadhi & Ors.* A.I.R. 1917 P.C. 6; I.L.R. 40 Mad. 402; 44 I.A. 98.

COURT OF APPEAL.

Ng Ek Teong for the appellants.

Eusoffe Abdoolcader for the respondents.

Cur. Adv. Vult.

Thomson C.J.: I have had the benefit of reading the judgment of Hill J.A. I agree with his conclusions and there is very little I can usefully add.

The facts of the case and the issues involved are fully stated in the admirably lucid judgment of Hepworth J.

The only question really in issue was whether or not there were arrangements between the plaintiff bank and the firm Heng Moh & Company, in whose favour the cheques in question in the case were drawn by the appellant company, in consequence of which the bank became holders for value of the cheques. That question in its turn depended in the last resort on the credibility of the three former servants of the bank who gave evidence but, as Hepworth J. correctly appreciated, their credibility did not depend only on his own subjective impressions of the witnesses but had to be considered also in the light of the other material that was available, particularly the accounts which were produced in evidence.

Like Hill J.A., I see no reason to quarrel with his reasoning in this connection or with the conclusion to which it led him.

Before us a great deal was made of the fact that the vouchers which related to the cheques when they were delivered to the respondent bank were not produced. It was argued that these documents were in the possession of the bank and they had failed to produce them and that therefore by reason of section 114 of the Evidence Ordinance and illustration (g) to that section the Court should have presumed that these documents if they had been produced would have constituted evidence unfavourable to the bank.

At the trial there was no mention of these documents until a very late stage. Evidence was given by a witness who at the material times was the manager of the branch concerned of the bank and he produced a large number of accounts and other documents and was cross-examined at length. Then another witness who had been a functionary of the bank gave evidence and he was also cross-examined at length, some of the cross-examination relating to the documents produced by the first witness. Then a third functionary of the bank gave evidence. Towards the end of his cross-examination he said:—

"The bank does keep a note of cheques purchased and cheques not purchased. It would be shown on the daily bank vouchers.

All cheques paid in by Heng Moh & Co., in 1956 would be recorded as purchased in those vouchers."

In re-examination he added to this:—

"The vouchers were posted item by item in the ledgers every day."

Shortly afterwards the Court adjourned for lunch and immediately after the resumption counsel for the bank asked for an adjournment to produce the vouchers which had been mentioned by the third witness. Counsel for the appellant company objected on the ground that the case had been going on for a long time, that the bank's lawyers must have been advised by bank officials who should have known their own system of working and should have known whether the vouchers in question were relevant to the case. He added that the point was not a new point, but it is not clear what he meant when he said this. In the event the trial Judge refused the application for an adjournment. Counsel for the appellant company then said he did not propose to call any evidence and both counsel then addressed the Court.

Now, section 114 of the Evidence Ordinance is not mandatory but gives the Court a discretion. It says that the Court may presume the existence of facts which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business and it furnishes a number of illustrations of the circumstances in which this discretion may be exercised. One of these illustrations is (g) which reads as follows:—

"The Court may presume—

.....

(g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it;"

The argument that in the present case a presumption unfavourable to the bank arose because of the non-production of the vouchers in question, whatever they may have been, can have made little impression on the trial Judge because he does not mention it in his judgment and in my view it was not a proper case for the making of any such presumption.

It is clear from a letter on the record that the bank had sworn an affidavit of documents and a supplementary affidavit of documents. Neither of these affidavits were produced before us and it would be wrong to speculate as to their contents. There has been, however, no suggestion that the adequacy of these affidavits was questioned at any time. It is no more than reasonable to suppose that it must have occurred to the appellant company's advisers at some stage of the proceedings that it is part of the ordinary course of dealings between banks and their customers that cheques delivered to a bank become at some stage associated with vouchers relating to them and it would have been a matter of ordinary prudence to take steps to obtain discovery of these vouchers whether or not they were enumerated in the schedules to the bank's affidavits.

Again, when the vouchers were first mentioned, which was towards the end of the trial, counsel for the bank professed anxiety to obtain them but this was opposed by counsel for the appellant company.

In all the circumstances I do not think the appellant company have any cause for complaint nor do I think were they entitled at the trial to rely in any way on the non-production of the vouchers. Whether or not they could have obtained discovery of them in the course of the interlocutory proceedings may well be a question of opinion and on the material before us it would be unsafe to express any very definite opinion regarding that question. The fact remains, how-

ever, that at the trial counsel for the bank was prepared to produce the documents if he was given the necessary adjournment and it was counsel for the appellant company who objected to this course and thus in effect resisted the production.

Before departing from the case I would quote the following passage from the judgment of the Privy Council in the case of *Bilas Kunwar* v. *Desraj Ranjit Singh*:— (1)

"It is open to a litigant to refrain from producing any documents that he considers irrelevant; if the other litigant is dissatisfied it is for him to apply for an affidavit of documents, and he can obtain inspection and production of all that appears to him in such affidavit to be relevant and proper. If he fails so to do, neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such documents."

Hill J.A.: This is an appeal from the decision of Hepworth J. in Penang High Court Civil Suit No. 225 of 1959.

The facts were very clearly set out in the learned trial Judge's written judgment and I cannot do better than repeat them here:

"The plaintiff's claim is against the defendant as drawer of two cheques drawn on the Taiping Branch of the Oversea-Chinese Banking Corporation Ltd., payable to a firm named Heng Moh & Co., or bearer for the sums of $17,000 and $14,840 respectively and dated respectively the 21st and 22nd November, 1957, and crossed 'A/C Payee only'.

The plaintiff claims as a holder in due course of the said two cheques having given value in good faith to Heng Moh & Co. The plaintiff alleges that there was a standing arrangement between the plaintiff and the said Heng Moh & Co., whereby the latter were permitted to draw against cheques paid in to the credit of their account prior to clearance. As a result the plaintiff had given value to the said Heng Moh & Co., in respect of the said two cheques and was accordingly a holder in due course.

The defence contends that there was no such arrangement between the plaintiff and Heng Moh & Co., as the plaintiff alleged, denies that the plaintiff upon delivery of the two cheques became a holder in due course in respect of them and contends that the plaintiff was only an agent for collection of the said two cheques."

Hepworth J. further stated:

"It is agreed by both parties that the sole issue in this case is whether there was such an arrangement as alleged by the plaintiff or not. If there was such an arrangement then the plaintiff was a holder in due course and is entitled to succeed. If there was no such arrangement then the plaintiff was only an agent for collection and his claim must be dismissed. The question that has to be decided is a question of fact."

The evidence led by the plaintiff/respondent in the lower Court consisted of three former senior employees of the plaintiff, now all re-employed by other banking concerns, and the former managing partner in Heng Moh & Co.

It is, I think, quite unnecessary for the purpose of this appeal to go into this evidence in any detail. Together with the exhibits it established that the plaintiff bank afforded Heng Moh & Co. not only general overdraft facilities but also had agreed to give credit in respect of paid-in cheques before they were cleared and the learned trial Judge was satisfied of the existence of the latter agreement. It appears from the 1957 bank account that cheques paid in by Heng Moh & Co. were credited to their account immediately on receipt and prior to clearance. Hepworth J. considered this account in detail and he came to the conclusion, with which I respectfully agree, that though the 1957 accounts were more indicative of general overdraft facilities that did not in itself negative the existence of an agreement to give credit in respect of paid-in cheques before they were cleared. The important point as the learned trial Judge saw it was that there was an agreement to give credit before clearance and that it was immaterial whether credit was given by permitting drawing before clearance or by reduction of the overdraft before clearance. The three "banking" witnesses obviously impressed him favourably and he could see no real reason why their story should be doubted, nor can I. As Hepworth J. points out, they were all responsible persons holding responsible positions in other banks.

It is to be observed that the defendant/appellant called no evidence.

During the course of the plaintiff's case the existence of certain vouchers became known to his counsel. These vouchers apparently have "C.B." marked on them, meaning "Claim Bill". He asked for an adjournment to produce them. Mr. Ng Ek Teong, for the appellant, objected to an adjournment and the application was refused.

Before this court Mr. Ng Ek Teong criticised the absence of these vouchers very strongly and argued that it was the plaintiff's duty to produce them and that an adverse inference should be drawn from their absence. He referred to the Indian case of *T.S. Murugesam Pillai* v. *M.D. Gnana Sambandha Pandara Sannadhi & Ors.* (2), and section 114, illustration (g) of the Evidence Ordinance.

This attitude seems somewhat inconsistent with that adopted by Mr. Ng Ek Teong in the lower Court, but be that as it may, I am far from satisfied that the production of the vouchers could or would have taken the matter any further or, indeed, if they would have proved to be of any assistance to the learned trial Judge. In fact, I am very hazy as to their significance.

In any event there is no question here of an attempt to suppress evidence by the plaintiff or by his counsel, quite the contrary in fact, and I cannot see the slightest justification for drawing an adverse inference as contemplated by section 114, illustration (g) of the Evidence Ordinance.

In the circumstances I can see no reason whatever for this Court to interfere with the judgment of Hepworth J. based as it was on findings of fact and, moreover, a judgment which was most carefully considered and reasoned.

I would dismiss this appeal with costs and order the deposit to be paid out to the respondent.

Good J.A.: I have had the benefit of reading the judgment of Hill J.A. with which I agree and have nothing to add.

Appeal dismissed.

Solicitors: *Braddell & Ramani; Presgrave & Matthews.*